No. 89-1316

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1989

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RONALD BEHAGEN,
*Petitioner,*

v.

USA BASKETBALL and WILLIAM WALL,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

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## PETITIONER'S REPLY BRIEF

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### INTRODUCTION

Respondents' Brief in Opposition (Op. Cert.) had two tasks to accomplish: it had to show that the facts underlying the case at bar could never recur, and it had to argue that the legal basis of the holding below, even if wrong, would not be of great significance for future cases. It succeeds at neither. The facts of the *Behagen* case may well be repeated, if not in basketball then in some other sport. And the legal principle adopted by the Tenth Circuit—an implied repeal of the Sherman Antitrust Act for National Governing Bodies for "amateur" sports—threatens to limit the effect and reach of the antitrust laws.

Respondents do nothing to undermine Behagen's conclusion that the Tenth Circuit, in reversing a jury verdict and finding an implied exemption from the antitrust laws in the language of the Amateur Sports Act, Pub. L. 95-

606, 36 U.S.C. § 371 *et seq.*, embarked on a course of judicial lawmaking both without precedent and of enormous significance. Nor do they address the inconsistency that lies at the very heart of the Tenth Circuit's opinion: that Respondents' behavior was immunized by the "clear intent" of Congress, *Behagen v. Amateur Basketball Association of the United States of America*, 884 F.2d 524, 530 (10th Cir. 1989); Petition for a Writ of Certiorari ("Pet.") at 11a, and yet that Respondents in allegedly carrying out that "clear intent" may do so in open disregard of the due process rights of their victims.

In their effort to obscure the novelty of the Tenth Circuit's analysis, Respondents do, however, suggest the existence of facts that cannot be found in the record, and introduce new legal arguments, addressed neither in the Petition nor in the decision below. It is to respond to those new matters that this Reply Brief is submitted.

## I. IMPLIED REPEALS OF THE SHERMAN ANTITRUST ACT ARE STRONGLY DISFAVORED.

This Court has consistently held that antitrust waivers will be implied only in the rarest of circumstances. Indeed, in *no* case has the Court found an implied repeal of the antitrust laws where there was not a governmental authority established to regulate the subject industry.[1] *National Gerimedical Hospital v. Blue Cross*, 452 U.S. 378, 389 (1981); *see also United States v. National Association of Securities Dealers*, 422 U.S. 694 (1975) and *Gordon v. New York Stock Exchange*, 422 U.S. 685 (1975). The decision of the Tenth Circuit in the case at bar directly contradicts that teaching by finding that the Amateur Sports Act is a *pro tanto* repeal of the

[1] Behagen does not make the argument attributed to him by Respondents that an "antitrust exemption cannot apply to a private rather than a governmental actor." Op. Cert. at 5. A private actor may be exempt, but only where a scheme of regulation (or self-regulation) is in place to police potentially anti-competitive conduct. *See Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).

Sherman Act even when no regulatory authority was created and when the actions challenged went far beyond Respondents' statutory mandate.

### A. Congress Did Not Intend for NGB's to Govern Openly Professional Sports and Certainly Granted No Antitrust Exemption for That Purpose.

Respondents assert that the injustice suffered by Ronald Behagen should go unremedied because the distinction between amateurs and professionals "has now been eliminated" in international basketball competition. Op. Cert., at 1.[2]

If this assertion is true, and USA Basketball is openly regulating a professional sport, then the entire basis for the Amateur Sports Act—the statute that the Tenth Circuit found to confer blanket antitrust immunity upon National Governing Bodies ["NGBs"] for *amateur* sports —has been eviscerated, because the Congressional concerns to which the statute is addressed simply do not embrace professional athletics. Far from being a reason to deny review, Respondents' assertion trumpets the claim that the *Behagen* decision stands as a precedent permitting *all* National Governing Bodies to regulate professionals as well as amateurs in their sports, and to grant and deny eligibility to athletes without antitrust scrutiny.

Behagen did not at trial and does not now contend that there is no difference between amateurs and professional athletes. He does argue, however, that he was at all relevant times a professional, and that the NGB for amateur basketball has no official authority, statutory or otherwise, to regulate professionals. It is not for an NGB

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[2] Nothing in the record establishes the truth of this claim, or suggests how, if true, it should be interpreted. Indeed, it was Respondents who moved *in limine* at trial to exclude evidence concerning developments in international sports organizations occurring after the facts that gave rise to this case.

created under the Amateur Sports Act to determine who may and who may not engage in a lucrative career playing sports for money overseas. To use an analogy that may be especially apt, Respondent USA Basketball stepped out of bounds—out of the bounds laid down by Congress—to foul Behagen, and now it seeks to reassure the Supreme Court that the out-of-bounds foul will never occur again, because it has unilaterally decided to expand the playing area.

If, as Respondents contend, the distinction between amateurs and professionals in international basketball has been "eliminated," then the antitrust immunity bestowed on Respondents by the Tenth Circuit would protect them from Sherman Act scrutiny even when they purport to regulate clearly professional athletes. Yet it is well settled that, of all professional sports, only baseball benefits from that exemption, for unique historical reasons. *Flood v. Kuhn*, 407 U.S. 258 (1972). Professional basketball does not enjoy such status. *Haywood v. National Basketball Association*, 401 U.S. 1204 (1971) (Douglas, Circuit Justice). Amateur organizations, such as the National Collegiate Athletic Association, are likewise subject to the antitrust laws, at least when they engage in commercial activities. *NCAA v. University of Oklahoma Board of Regents*, 468 U.S. 85 (1984).

In enacting the Amateur Sports Act, Congress surely did not intend to extend the *Flood* exemption or to create an exception to *Haywood*. If, therefore, the distinction between amateurs and professionals has been "eliminated," then the error in the Tenth Circuit's implication of antitrust immunity is more, not less, evident.[3] The

[3] Whatever changes have recently been made to permit professional basketball players some of the privileges heretofore reserved to amateurs, such as eligibility to play in the 1992 Olympic Games, can as easily be undone. Further, even the limited extension of certain amateur privileges to professionals in the sport of basketball has not been replicated in other sports. There are over

appeals court's decision rests on the "monolithic control" Congress allegedly conferred upon NGBs over *amateur* sports. *Behagen*, 884 F.2d at 529; Pet. at 11a. Behagen presented evidence to the jury that he was not at the relevant times an amateur within the meaning of the Act. Respondents simply had no authority under that statute to deprive him of his right to earn a livelihood. Congress did not confer that power upon Respondents; still less did Congress "implicitly" permit its exercise in a way that does not satisfy "rule of reason" antitrust analysis.

### B. The Amateur Sports Act Was Intended to Regulate Destructive Competition Among Amateur Athletic Organizations, Not to Govern the Marketplace for Professional Players.

Respondents proffer a number of other novel legal arguments that are not part of the holding below, and that should be rejected by this Court. They try to distinguish *National Gerimedical*—the strongest condemnation of antitrust repeals by implication—on the grounds that the "congressional intent" behind the statute there construed was the promotion of competition. Op. Cert. at 5 n.2. But this simply misreads that decision. The Court did find legislative history of the statute at issue to include references to "maintaining and improving competition." 452 U.S. at 387. That contrasted, however, with other statutory expressions that competition had to be restricted. 452 U.S. at 387-8. Indeed, the Court expressly referred to and endorsed earlier decisions that there will be no blanket exemption even where Congress found "that some substitution of regulation for competition was necessary." 452 U.S. at 392 (citations omitted).

It is misleading at best to state, as do Respondents, that "Congress intended the Amateur Sports Act to

40 National Governing Bodies. While some permit professional athletes to participate in preivously amateur events (*e.g.*, tennis, ice hockey), others—such as those governing the sports of boxing and skiing—do not.

eliminate problems caused by undue competition." Op. Cert. at 5 n.2. The competition addressed by Congress in the Amateur Sports Act was the competition between *organizations* seeking to select Olympic teams and to carry out the other functions now assigned to NGBs. The Act is utterly silent as to the kind of competition at issue here: competition among individual athletes in the marketplace for basketball playing services in exchange for pay. It is inconceivable that Congress considered for an instant the relevance of the legislation to that kind of purely commercial activity.

As this Court noted in *National Gerimedical*, "[a]ntitrust repeals are especially disfavored where the antitrust implications of a business decision have not been considered by a governmental entity." 452 U.S. at 390 (citations omitted). Here there was no such consideration and no such entity, either in the enactment of the statute or in the execution of a regulatory scheme.

The decision below is directly contradicted by *National Gerimedical*, a unanimous opinion that has never been questioned. There is simply no reason for the outcome here to be different.

### C. The Court Should Decline Respondents' Invitation to Decide the Case Based on Issues Not Briefed Before It: The Tenth Circuit Already Made That Mistake.

Respondents also argue that the Tenth Circuit should be affirmed for reasons that form no part of the decision whose review is sought. They claim that their actions in denying Behagen the right to practice his chosen profession did not have an effect on United States commerce so as to come within the Sherman Act.

Interestingly, this argument was put forward at great length by Respondents in the court below, *see* Brief of Appellants at 12-17, and was rebutted by Petitioner there, *see* Brief of Appellee at 15-25. Yet the argument

did not find its way into the Tenth Circuit's decision, which turns on a contention (implied antitrust immunity for NGB's) that was not briefed or argued by either side. Respondents would turn the appellate process on its head, asking this Court to rule on the basis of an argument put forward but not adopted below, while the court below ruled on the basis of an argument briefed for the first time in this Court.

In fact, the record below amply demonstrates the substantial impact of Respondents' conduct on the foreign commerce of the United States. As Respondents' witnesses admitted at trial, the so-called "rules" that Behagen challenged in this case affected Americans almost exclusively and were deliberately intended to regulate American players' access to overseas basketball leagues. Respondents are a United States citizen and a corporation with its place of business in Colorado. Far from being "precisely the type of foreign activity not protected [*sic*] by the antitrust laws," Op. Cert. at 7, Respondents' conduct took place in the United States, directly affected the rendering of services by Americans (albeit abroad),[4] and had the result of decreasing competition by Americans for a substantial number of employment opportunities.

There is surely no basis in the case before this Court to credit Respondents' theory that their behavior did not affect the foreign commerce of the United States.[5]

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[4] Services rendered by Americans overseas are part of the foreign commerce of the United States. *See, e.g., Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969).

[5] Respondents' view of the scope of the antitrust laws actually undermines their support for the grounds of the decision below. Congress surely cannot have "clearly intended" to confer antitrust immunity upon acts of Respondents that were outside the scope of the antitrust laws in the first place.

## II. THE TENTH CIRCUIT'S EXONERATION OF RESPONDENTS DUE PROCESS OBLIGATIONS.

Finally, Respondents err in suggesting that Behagen asks this Court to reverse its decision in *San Francisco Arts and Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987). Petitioner argues that *if* Respondents' actions are above antitrust scrutiny because they were *necessary* to implement the *clear* intent of Congress to create an entity with "monolithic control", *Behagen*, 884 F.2d at 527; Pet. at 6a, then it follows logically Respondent USA Basketball is a governmental actor subject to due process obligations.

*San Francisco* concerned the governance of *amateur* sports; this case, the jury decided, does not. This case concerns the governmental function of determining who may and who may not practice a certain profession. *San Francisco* does not say that *no* activity of the U.S. Olympic Committee could be considered to be government action; it held that the Committee was not acting as a governmental entity because "[t]here is no evidence that the Federal Government coerced or encouraged" the USOC's conduct. *San Francisco*, 483 U.S. at 546-7.

Here, if the Tenth Circuit was right, and Respondents' conduct was compelled by congressional intent, then under *San Francisco* their actions are attributable to the government. To hold otherwise would be to place Respondents beyond the law: exempt from antitrust scrutiny because they were doing Congress's express bidding, and exempt from due process strictures because they were not.

Behagen's argument is not inconsistent with *San Francisco*. The conclusions of the Tenth Circuit are, however, inconsistent with fundamental principles of accountability, fairness, and due process of law.

## CONCLUSION

The decision of the Tenth Circuit below is a dangerous precedent. It finds an implied repeal of the Sherman Act where there is no entity charged with protecting competition: a result repeatedly rejected by this Court. Its facts could easily recur, and it opens the door for widespread judicial bestowal of antitrust immunity not conferred by Congress.

Moreover, the combined effect of antitrust and due process immunity, unlimited by any language of the court of appeals, raises those who rule the world of "amateur" basketball and other sports to a level of power and authority that has no place in a democratic society. It sets them above the law.

For these reasons, Petitioner prays that the writ should issue, and the decision below should be reversed.

Respectfully submitted,

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